Aboriginal fisheries and the sparrow decision

Background Paper

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THE ABORIGINAL FISHERIES AND THE *SPARROW* DECISION

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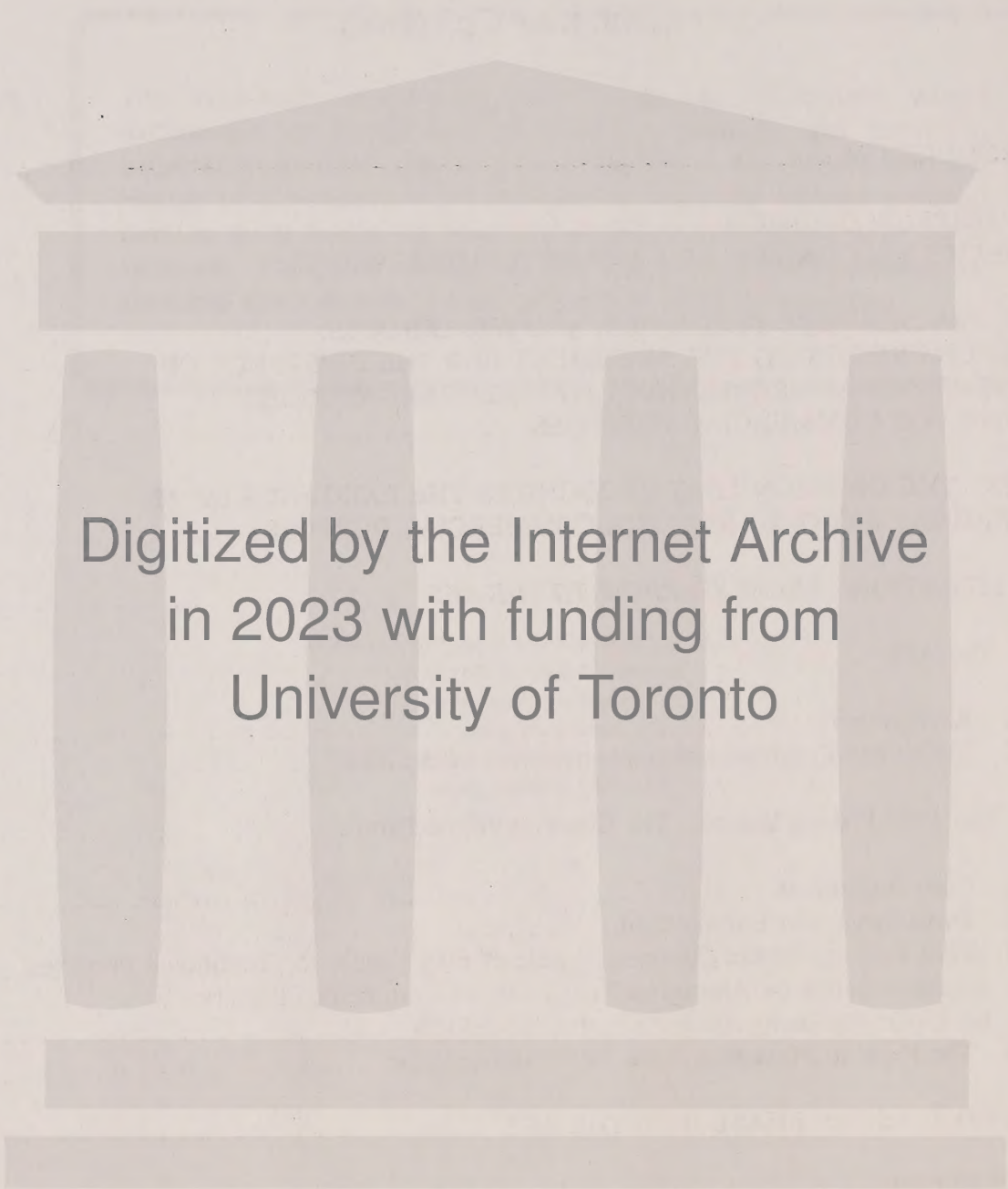

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THE ABORIGINAL FISHERIES AND THE *SPARROW* DECISION

INTRODUCTION

> The biological clock for the fish is ticking much faster than the federal bureaucracy's clock ticks.[1]

The economic value of the commercial salmon fishery in British Columbia is estimated at $1 billion annually. If we add to this figure the value of the sport fishery and the traditional aboriginal fishery, we can only conclude that the socio-economic importance of this industry is considerable. We can also readily understand that managing such a multifaceted industry is very complex, and that the various interests of the parties concerned are hard to reconcile.

Management of the west coast salmon fishery is affected both by the cycles of the resource itself, and, particularly, by the claims of the three main parties concerned: commercial fishing groups, sport fishing groups, and aboriginal people.

All the parties agree that the 1992 Fraser River salmon fishing season was extremely chaotic; it has even been called an environmental disaster. That season marked the introduction of a new federal government initiative, the Aboriginal Fisheries Strategy (AFS). This was enough for some observers to jump to the conclusion that there was a link between that year's problems and the introduction of the federal program. Whether or not that conclusion is valid, the debate over the 1992 Fraser River salmon fishing season clearly reached hitherto unequalled levels of emotion and frustration; nor is the issue yet resolved.

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(1) Cecil Andrus, Governor of Idaho, quoted in "Send Strong Signal on Salmon," *Northwest Energy News*, January/February 1993, p. 5.

In fact, the AFS gives rise to an issue that is much broader than a mere debate over the west coast salmon fishery. It is obviously much more complex, having to do with the constitutional right not only to use the fisheries but also to occupy territories. It is further complicated by the fact that some AFS objectives flow from the 1990 Supreme Court of Canada decision in *Sparrow*.

The 1992 situation on the Fraser has already been analyzed in depth in a report by Peter H. Pearse and Peter A. Larkin, who, in September 1992, were commissioned by the Honourable John C. Crosbie, Minister of Fisheries and Oceans, to conduct an investigation into the events of the summer of 1992, particularly the so-called disappearance of some 500,000 salmon. The Pearse-Larkin report, *Managing Salmon in the Fraser*, published in December 1992, was well received; in it, the authors analyze in depth the scientific, social and political aspects of the issue, and make recommendations for improved management of the resource in order to ensure that it will continue to exist.

There is no point in reiterating the Pearse-Larkin analysis; and it is difficult to criticize a Supreme Court decision. The issue itself, while complex, has taken a very predictable form as it pits those favouring greater aboriginal autonomy in fisheries management against those opposing such autonomy. To understand this complicated issue clearly, and perhaps to advance it somewhat, it is useful to outline the opposing positions and follow the progress of the Supreme Court decision, from the time it was handed down to its implementation as a government program.

In this paper, analysis of this issue will be based on the technical aspects of the *Sparrow* decision, the terms and conditions of implementation of the AFS, and some of the information collected by the Standing Committee of the House of Commons on Forestry and Fisheries during its three days of public hearings in Vancouver from 25 to 27 January 1993. These meetings allowed the Committee to exchange views with numerous witnesses (over 40 organizations and individuals) and some of the Committee's observations deserve comment. Our work, which is based mainly on messages from those with first-hand experience of the 1992 Fraser River salmon fishing season, aims to inform and to provoke thought. We are hopeful that the information and subsequent reflection will go towards preventing any recurrence of the events on the Fraser in 1992, either there or elsewhere.

THE *SPARROW* DECISION: FISHERIES RECOGNIZED AS A CONSTITUTIONAL RIGHT

In *Sparrow*,[2] the Supreme Court of Canada considered for the first time the scope of section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms the ancestral and treaty rights of the aboriginal people of Canada. The constitutional text does not specify the nature or content of the rights that are protected, however, nor does it anticipate the effect of recognizing and confirming these rights; in fact, some authors have even wondered whether the purpose of the wording was to limit the type of remedy available to those whose rights are infringed upon.[3] Although the Supreme Court endeavoured to address the many issues involved, it only raised others, which are still contentious.[4]

The incident that sparked the trial is easily summarized. Ronald Edward Sparrow, a member of B.C.'s Musqueam band, was charged with fishing with a net longer than that permitted by his subsistence fishing licence, in contravention of the *Fisheries Act*. Sparrow did not dispute the facts; on the contrary, he argued in his defence that he was exercising an existing aboriginal fishing right; that is, a constitutional right protected under section 35(1) of the supreme law of the country. At his trial, Sparrow was convicted. The trial-level judge held that an aboriginal right could not be claimed unless that right had been ratified by a treaty or other official document. The County Court upheld that decision.

In hearing the case, the B.C. Court of Appeal upheld the argument that Sparrow was exercising an aboriginal fishing right, that is, a right that his ancestors had held from time immemorial. This Court recognized that Parliament had legislative authority to regulate the fisheries in order to ensure conservation and sound management of the resource. While accepting that the aboriginal people's right to fish could be regulated, the Court emphasized that any regulation imposed must be reasonable. It also noted that section 35 of the *Constitution Act,*

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(2) *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.

(3) Michael Asch and Patrick Meadows, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*," *Alberta Law Review*, XXIX, 2, 1991, p. 498.

(4) Chris Tennant, "Justification and Cultural Authority in s 35(1) of the *Constitution Act, 1982: R.* v. *Sparrow*," *Dalhousie Law Journal*, Vol. 14, No. 2, 1991, p. 372, at p. 386.

1982, stated that aboriginal people's right to fish for subsistence purposes should from then on have priority over the interests of other fishing groups. Since Sparrow's conviction had been based on an error in law, it was quashed by the B.C. Court of Appeal.

The Supreme Court of Canada adopted a similar approach without, however, fully exonerating the accused. It accepted the fact that Sparrow had an existing aboriginal right, but noted that certain constitutional issues should be referred back to the court of first instance, and established criteria that the trial-level judge should take into account. The Supreme Court also seems to indicate that the government, referring to this decision, should open negotiations with the aboriginal people.

A number of general principles arise from the Supreme Court decision. First, the Court established that section 35 of the *Constitution Act, 1982* applies only to rights that existed at the time this provision came into force. In other words, the term "existing" means "unextinguished in 1982." However, the Supreme Court specified that the way in which the right was regulated until that time does not dictate the extent of the right. It stated that, on the contrary, the term "existing aboriginal rights" must be interpreted flexibly in order to allow these rights to evolve over time, and it categorically rejected the "frozen rights" argument. Later in its reasoning, the Supreme Court emphasized that section 35 must be given a generous, liberal interpretation in light of its objectives.

As we have already noted, the Supreme Court concluded that members of the Musqueam band had an aboriginal right to fish, particularly for food, social and ceremonial purposes. It also concluded that the Crown had been unable to demonstrate that this right had been extinguished by the Regulations concerned; a regulation does not amount to extinguishment. In order to extinguish an aboriginal right, the Crown must demonstrate clear and plain intent to do so, a test that is stricter than the test put forward by the Crown. The Supreme Court also noted that neither the *Fisheries Act* nor its accompanying *Regulations* demonstrate the required intent to extinguish a constitutional right. In the opinion of the Supreme Court, the fact that the Department of Fisheries and Oceans (DFO) issued licences to individuals at its own discretion indicated no more than an intent to manage the fisheries, rather than an attempt to define aboriginal fishing rights.

Section 35 is not part of the *Canadian Charter of Rights and Freedoms*; it is fully a part of the Constitution, under the heading "Rights of the Aboriginal Peoples of Canada." Readers are reminded that the Charter includes "limiting" clauses: section 1 confirms that the rights set out are guaranteed, but notes that they may be subject to reasonable limits prescribed by law; section 32 specifies that only the federal and provincial governments are bound by the Charter; and section 33 allows legislatures to opt out of certain rights, notwithstanding their being enshrined in the Charter. As a result, some observers have argued that aboriginal rights are absolute, since they were not explicitly subject either to a justification test such as the one in section 1 of the Charter or to section 33, the notwithstanding clause.(5) This argument was made--unsuccessfully--before the Supreme Court. Although the Supreme Court indicated that section 35 was not subject to sections 1 or 33 of the Charter, it recognized that the government could enact legislation or make regulations limiting aboriginal people's fishing rights if this infringement could be justified. In the opinion of the Supreme Court, such an analysis must be made in steps: it must be determined, first, whether a right has been infringed, and, then, whether the infringement is justified.

The Supreme Court ruled that, when the legislative measure concerned limits the exercise of an existing aboriginal right, there is, *prima facie*, infringement of section 35 of the *Constitution Act, 1982*. In order to determine whether there is indeed infringement, the Supreme Court established the following list of questions.

1) Is the limitation unreasonable?

2) Does the regulation impose undue hardship?

3) Does the regulation deny the aboriginal people their preferred means of exercising their right?

Once it is determined that infringement of an aboriginal right did occur, the next step is to determine whether the infringement was justified. Although the Supreme Court stated that aboriginal rights are not subject to the justification test in section 1 of the *Charter*, this

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(5) W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" *Queen's Law Journal*, Vol. 15, 1990, p. 217.

Court did subject these rights to an identical analysis, a fact that has been criticized by some authors.[6] The justification test established by the Supreme Court requires, first of all, a valid legislative objective. A suggested example of such an objective is a regulation made in order to ensure the management and conservation of a natural resource. Secondly, the justification test requires consideration of the federal government's fiduciary duty toward aboriginal people. This second requirement is an essential factor in resource allocation. The Supreme Court indicated the need for guidelines to solve resource allocation problems that would certainly arise in future. The Court also noted that, in *Sparrow*, subsistence fishing by aboriginal people should be given priority, after conservation requirements.

The Supreme Court refused to draw up an exhaustive list of factors in the justification test, but noted several points that a court could consider, including the following:

- whether there has been as little infringement as possible;
- if there has been expropriation, whether fair compensation has been made to the aboriginal people;
- whether the aboriginal group concerned has been consulted about the conservation measures imposed.

In summary, the *Sparrow* doctrine consists of three main issues:

1) Is there an aboriginal or treaty fishing right?
2) If so, does the regulation or legislation concerned infringe on this right?
3) If there is infringement of the right, is the infringement justified?

The Supreme Court noted that the aboriginal people had the burden of proving the existence of, and infringement on, the aboriginal right. The Crown, on the other hand, had the burden of proving justification, that is, demonstrating that DFO's legislative objective of

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(6) David Elliot, "In the Wake of *Sparrow*: A New Department of Fisheries?", *UNB Law Review*, Vol. 40, 1991, p. 23, at p. 41; Binnie (1990), p. 217, at p. 237; Sébastien Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*" [the constitutional protection of the aboriginal rights of aboriginal peoples and the *Sparrow* decision], *McGill Law Review*, 36, 4, 1991, p. 1382, at p. 1396.

adopting limiting measures was both valid and justifiable. The Supreme Court suggested that, in light of the government's fiduciary duty toward aboriginal people, it must limit the exercise of its legislative authority. This Court also specified that the final decision would depend entirely on the findings of fact in a specific case, and that a case-by-case approach should be adopted.

It should be noted that, in *Sparrow*, the Supreme Court refused to consider the existence of an aboriginal right to fish for commercial purposes, an issue which, it stated, had not been debated before the lower courts. Some authors have developed their own theories about why the Supreme Court hesitated to take up this thorny question.(7) Whatever the reasons for its refusal, at this stage in the development of the jurisprudence, the Supreme Court limited itself to analyzing aboriginal people's constitutional right to fish for food, social and ceremonial purposes.

This situation does not mean that the Supreme Court has ruled out the possibility of the aboriginal people's eventually claiming a commercial fishing right; on the contrary, it suggested that such a claim would be a contentious issue in future. The Chief Justice emphasized the following point.

> It was contended before this Court that the aboriginal right extends to commercial fishing. While no commercial fishery existed prior to the arrival of European settlers, it is contended that the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes. The presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.(8)

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(7) Grammond (1991), p. 1382, at p. 1391.

(8) *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, at p. 1100-1101.

Since evidence of the existence of an aboriginal or a treaty right is closely linked to the facts at issue, it is not surprising that the lower courts reached diverging conclusions about the existence of an aboriginal right to fish for commercial purposes. The courts hearing such cases must consider the past and present backgrounds against which the aboriginal people concerned have evolved and continue to evolve, and must examine in depth the relevant treaties, legislation and regulations. It is quite likely that only a further interpretation by the Supreme Court of Canada will put an end to the debate.

Since *Sparrow*, several lower courts have attempted to delineate the extent of the aboriginal fishing right. Some judges concluded that this aboriginal right included commercial fishing, while others clearly rejected this argument. Below we analyze five recent decisions in this regard: in *Reid*, *Van Der Peet*, *Gladstone*, and *Smokehouse*, the judges rejected the argument for the existence of constitutional protection of the right to fish for commercial purposes; in *Jones*, the judge accepted this argument.

REID, *VAN DER PEET*, *GLADSTONE*, AND *SMOKEHOUSE*: DECISIONS REJECTING THE ARGUMENT FOR THE EXISTENCE OF CONSTITUTIONAL PROTECTION OF AN ABORIGINAL RIGHT TO FISH FOR COMMERCIAL PURPOSES

In *Reid*,[9] Mr. Justice Collier of the Federal Court of Canada denied a request by the Heiltsuk band that the Minister of Fisheries and Oceans issue it a commercial licence to fish for herring in a region near Bella Bella, British Columbia. It should be noted that the decision is quite brief: Judge Collier stated that he was unable to analyze the issue in greater depth because of lack of time, and for health reasons. He concluded that herring was a traditional source of food for the Heiltsuk, and recognized that in the past the Heiltsuk exchanged herring for other goods, especially food. He emphasized, however, that simply trading food was not the equivalent of trading commercially. In his opinion, the Heiltsuk were unable to demonstrate that they had an aboriginal right to fish for herring for commercial purposes.

In late June 1993, the B.C. Court of Appeal made eight decisions, compiled in two voluminous documents, that constitute a review of the extent of rights protected by section 35 of the *Constitution Act, 1982*. The aboriginal people concerned claimed various remedies,

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(9) *Reid* v. *Canada* [1993] 2 C.N.L.R. 188.

including formal recognition of their right to self-determination, right of ownership of and jurisdiction over the territories, and fishing and hunting rights. Three of these decisions--*Van Der Peet*, *Gladstone* and *Smokehouse*--specifically address the issue of whether the aboriginal fishing right includes the right to sell the fish for commercial purposes.[10] In each case, a majority of justices rejected the argument put forward by the aboriginal people. In each case, however, there was at least one dissenting voice.

In these three cases, the reasoning of the majority is essentially the same. The most detailed decision is certainly *Van Der Peet*. In this case, Judge Macfarlane considered that a custom does not become an aboriginal right unless it was and still is an integral part of aboriginal distinct culture. In order to claim a right now, an aboriginal people need not prove that it has exercised the right since time immemorial, but only for a very long time. Judge Macfarlane also indicated that a modernized form of an ancient custom would be protected. However, he emphasized that a custom that was not formerly an integral part of an aboriginal people's culture, but that has developed as a result of contact with Europeans, does not constitute a constitutionally protected aboriginal right.

Judge Macfarlane recognized that fishing has been an integral part of the aboriginal people's distinct culture, with even religious importance. He concluded, however, that conservation is also a part of aboriginal traditions and prevents aboriginal people from overusing the fisheries. Noting that when there was a surplus in the past, the resource was shared in order to meet everyone's needs, Judge Macfarlane said that this historical fact is not the equivalent of commercial use. As a result, in his opinion, the sale of fish to Europeans cannot be construed as the natural development of an aboriginal right. He indicates that, on the contrary, the very nature of this activity changed greatly after the arrival of Europeans and that, therefore, commercialization of the fisheries is not an aboriginal custom. He specified that aboriginal people can now participate in the commercial fishery, but are then subject to the same regulations as other fishing groups.

Mr. Justice Lambert wrote a dissenting opinion in *Van Der Peet*, *Gladstone*, and *Smokehouse*. In Lambert's opinion, aboriginal rights are constantly evolving and were not

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(10) *R.* v. *Van Der Peet*, *R.* v. *Gladstone*, and *R.* v. *Smokehouse*, Court of Appeal of British Columbia, unpublished, 25 June 1993.

frozen at the time just preceding European contact. Lambert described the exchange of fish for other food as the forerunner of commercial trade introduced by Europeans. In Lambert's opinion, therefore, an aboriginal right to participate in the commercial fishery exists and has been incorporated into the common law, but regulations banning the sale of fish caught under a subsistence fishing licence do not constitute unreasonable interference with the exercise of this aboriginal right. Lambert indicated that aboriginal people who wish to participate directly in the fisheries have a right to earn a modest living by doing so. Specifically concerning the Fraser, he noted the importance of negotiation and consultation with all users in order to determine resource allocation. Lambert's words in this regard deserve to be quoted:

> The needs of conservation in the Fraser River fishery are very difficult to assess and to administer. There are many Indian bands with aboriginal fishing rights over sections of the river and over the estuary of the river and perhaps over the returning fish. There are the needs of the commercial fishery which, subject to the true moderate livelihood needs of the aboriginal people on the river, must be protected through conservation of the whole Fraser River fishery. A complex process of negotiation, concession, sharing, administration and enforcement is required. In my opinion the administration of the fishery on the River must in the end be controlled by one single authority. That single authority would follow full procedures for consultation with all those interests affected by its decisions.
>
> I understand that steps have now been taken to consult with the aboriginal peoples who have fishing rights in the Fraser River system and to put in place an allocation system which reflects those rights and the rights of others. Perhaps further steps will be required.[11]

Obviously, only the dissenting voice in the B.C. Court of Appeal cases favours the kind of negotiations that led the Department to develop the AFS.

JONES: DECISION RECOGNIZING THE EXISTENCE OF AN ABORIGINAL RIGHT TO FISH FOR COMMERCIAL PURPOSES

A decision by Judge Fairgrieve of the Court of Ontario (Provincial Division) grants constitutional protection to the right of aboriginal people right to participate in the

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(11) *R.* v. *Van Der Peet* (1993), 132.

commercial fishery. Two Ojibway from the Cape Croker reserve had been charged with catching more lake trout than permitted by their licence; the band held a commercial fishing licence. The aboriginal people argued that the limitations imposed by DFO were an unjustified infringement on the exercise of their aboriginal or treaty rights to fish for commercial purposes. Judge Fairgrieve agreed with them.

In *Jones*, Judge Fairgrieve first considered the extent of the *Sparrow* decision. He recognized that the Supreme Court of Canada had not addressed the issue of commercial use of the fisheries by aboriginal peoples, but noted that it had established principles that could be used as guidelines in analyzing the issues raised in this case. One principle established by the Supreme Court and adopted by Judge Fairgrieve was the method to be followed in interpreting section 35 of the *Constitution Act, 1982*. This principle can be summarized as follows: the rights protected by section 35 must be given a generous, liberal interpretation by the courts, and the courts must ensure that any ambiguity is resolved in favour of the aboriginal peoples.

In light of the constitutional principles established by the Supreme Court, Judge Fairgrieve raised the following three issues.

1) Is there an aboriginal or treaty fishing right to fish for commercial purposes?

2) If so, do the established lake trout quotas infringe on this right?

3) If there is infringement of the right, is the infringement justified?

Where the first issue is concerned, the Crown conceded that the accused had a collective aboriginal right to fish for commercial purposes. It was also recognized that the Saugeen Ojibway had a similar right under an 1836 treaty, further confirmed by an 1847 imperial proclamation; the treaty right guaranteed the aboriginal people free access to their traditional territorial waters. Judge Fairgrieve nevertheless specified that the collective Ojibway right was not exclusive. Essentially, in his opinion, this aboriginal right consists of the right to use the resource for subsistence, not for purely profit-motivated commercial purposes. However, he emphasized that the band's collective right to meet its needs through fishing had always formed an integral part of its economy.

Judge Fairgrieve's answer to the second question was affirmative. In his opinion, establishing a lake trout quota for the Ojibway constitutes infringement on the exercise of their right to fish. Because of this limitation, the band had experienced financial difficulties: the rate of unemployment and the degree of poverty had increased for both individuals and the community.

In response to the last question, Judge Fairgrieve agreed that the objective of establishing quotas was justified: it was an attempt by DFO to preserve stock through conservation and sound management of the resource. He emphasized, however, that constitutional protection of Ojibway aboriginal and treaty rights to fish for commercial purposes means that, in resource allocation, the Ojibway must be granted priority over all other user groups, once conservation measures have been implemented. In Judge Fairgrieve's opinion, sport fishing groups and non-aboriginal commercial fishing groups had even received favourable treatment. He therefore invalidated the Regulation at issue. In conclusion, he specified that DFO should in future seek the participation of the Ojibway in developing a fisheries resource allocation plan that gives first priority to aboriginal fishing groups.

THE SITUATION: FROM *SPARROW* TO THE AFS

A. The AFS

1. Background

The issue of aboriginal fisheries management is not new; it is well documented on both the west and east coast. Aggravated by other Canadian constitutional debates, however, it has become ever more important in the past few years.

For over 20 years, DFO has followed a policy of giving priority to aboriginal peoples where subsistence fishing is concerned. The aboriginal fishery has priority over the commercial fishery and the sport fishery, but not over resource conservation, an area in which DFO retains exclusive control, under the *Fisheries Act*.

Sparrow had the effect of forcing DFO to act with respect to the aboriginal fisheries. A particularly significant sentence from the Pearse-Larkin report clearly describes

how this decision radically altered DFO's managerial role: "The Sparrow decision forced the government to respond to a partly-defined and evolving aboriginal right to fish, protected by the Constitution, without prejudicing the ultimate resolution of the issue through comprehensive claims settlements."[12] We cannot better describe the complexity of the situation and the limited room to manoeuvre available to the managers responsible for fisheries policies.

Against this background, the Department developed the AFS, which it considers the federal government's response to the need to expand aboriginal peoples role in the fisheries while at the same time conserving fish stocks and maintaining a stable environment, predictable resource-sharing and profitable fisheries for all parties concerned.[13]

The legal opinion drawn up by Justice Canada for DFO following *Sparrow* is still a confidential document, to which even the Standing Committee of the House of Commons has been denied access; we can nonetheless speculate that the foregoing issue, as worded by DFO, accurately reflects the spirit of the opinion given by Justice Canada. This wording refers to profitability, which can be achieved only through the sale of fish. As we shall see, the sale of fish is still at the heart of the debate over the AFS.

The government's purpose in adopting the AFS was not just to develop a simple fisheries program but, in fact, to establish a social contract among the government, aboriginal peoples and non-aboriginal fishing groups.[14] However, this social contract has acted more to form a rift between the parties concerned than to bring them closer together.

2. Terms and Conditions of Implementation of the AFS

When it was introduced in June 1992, the AFS was given a budget of $140 million over a seven-year period; 70% of that amount is earmarked for British Columbia. From 1992 to 1997, approximately $73.5 million will be allocated to fisheries-based economic

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(12) Peter H. Pearse and Peter A. Larkin, *Managing Salmon in the Fraser*, Vancouver, November 1992, p. 13 hereafter "Pearse-Larkin Report.

(13) Canada, Department of Fisheries and Oceans, "Backgrounder II: The Context," *Aboriginal Fisheries Strategy*, June 1992.

(14) Canada, Fisheries and Oceans, "Backgrounder I: The Program," *Aboriginal Fisheries Strategy*, June 1992.

development and to the training and participation of aboriginal people in fisheries management activities. Other government programs, including Employment and Immigration Canada's Affirmative Action Program for aboriginal people, "The Roads to Success," will also be used to meet some AFS objectives.

Buying back commercial fishing licences, particularly west coast salmon licences, in order to allocate some of the resource to aboriginal groups, will account for $7 million. All parties consider this amount quite inadequate; we analyze this component of the AFS below.

Approximately $4 million has been allocated for research; agreement negotiations, including funding for aboriginal groups and third parties, will cost $11.5 million. The Lower Fraser Fishing Authority (LFFA) has become the umbrella organization responsible for supervising the agreements reached between DFO and the Tsawwassen, Musqueam and Stolo aboriginal communities. These agreements provide, among other things, that the bands will carry out certain administrative duties such as the issuance of licences, monitoring of catches and surveillance of the fishery. In this regard, the LFFA received $1.1 million for programs for fisheries guardians and catch-monitoring officers and other administrative expenditures.

The AFS also provides for a $20-million transfer from the DFO budget to aboriginal groups who will be responsible for some fisheries management services now provided by the Department, such as the operation of existing facilities and small craft harbours.

Lastly, the AFS called for pilot projects for the commercial sale of fish in 1992. It should be noted that some aboriginal groups in British Columbia have long claimed the right to sell their fish legally (see the section on *Sparrow* above). The pilot projects were therefore designed to evaluate the opportunities for the bands that this new economic activity could create. These pilot projects were carried out on the lower Fraser, a region difficult to manage because the ban on the sale of fish has often been challenged there, even in court. It is also well known in this region that aboriginal peoples openly fish on a large scale and quite well-structured networks exist for the illicit sale of fish.

The agreements on the pilot projects for the commercial sale of fish initially covered only 1992, and were subject to review on expiry; however, as we shall see, the pilot projects have not had the desired results.

B. The 1992 Fishing Season: The Concerns of the Parties

In 1992, $14.7 million was spent in British Columbia under the AFS. Nearly 75% of the aboriginal people in that province, who traditionally depend on the salmon fishery, reached agreements on resource management development projects.

In 1992, over 80 agreements were reached in 1992 with various aboriginal groups in the province. In the Fraser system, the value of the agreements totalled $3.6 million, which benefited some 26 signatory bands. In the north of the province, agreements with a total value of $5.9 million were reached by seven groups, while 24 groups on Vancouver Island and in central B.C. reached agreements valued at $4.4 million. These amounts, which are appreciable, nonetheless do not affect all the parties, which explains in part why these groups have considerable concerns.

1. Communications

If the most frequent criticism made by the parties concerned had to be singled out, it would certainly be communication. A great many members of commercial fishing groups stated that the AFS had created a great deal of dissatisfaction and resentment because the consultation and implementation process was poorly developed from the outset. In this regard, a comment by the representative of the Fishing Vessels Owners' Association is very representative:

> The Minister of Fisheries has stated the principles that ought to make processes like this work. He has stated that what he intended to do was to have a transparent ministry, full consultation with all affected user groups, and solutions that would maintain stable and profitable commercial fisheries. Of course, none of those things has happened. If we had a department that did not have hidden agendas, and if the process of consultation was a meaningful one, then I think we could find some solution. But behind-the-door deals, done by bureaucrats without a direct interest in the results of these things, is not the way to go. The kind of people who have to be at the table are fishermen.(15)

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(15) Canada, House of Commons, Standing Committee of the House of Commons on Forestry and Fisheries, *Minutes of Proceedings and Evidence*, 25 January 1993, 16:63.

Non-aboriginal commercial fishing groups have the very strong impression that they have been left out in the cold; they accuse DFO of favouring the entry of a third party, the aboriginal peoples, into the commercial fisheries. In the opinion of these commercial fishing groups, the fact that they had little to do with the negotiations, and the incomplete and sometimes even biased information they received, are irrefutable evidence that the aboriginal peoples have been given special access to the resource. They therefore consider that the AFS disrupts a balanced management of salmon stocks, and that they--who claim always to have respected and promoted this balance--are prevented from contributing to the new orientations adopted.

A list of the consultation and negotiation meetings held when the AFS was being developed, however, clearly demonstrates that many discussions took place; furthermore, this list indicates considerable participation by the DFO Regional Office, contrary to popular belief on the west coast that it was excluded from the process of developing the AFS.

In the opinion of the commercial fishing groups and the industry, the communication gap between them and DFO headquarters is just as wide as the one between them and the Regional Office. Their comments are extremely harsh, particularly with respect to senior officials in Ottawa, whom they accuse of being completely ignorant of reality, having pre-empted the Regional Office, and thus having developed a strategy behind closed doors that responds to none of the industry's concerns.

Their deep-rooted resentment of the Deputy Minister of Fisheries has come to the point where it will be nearly impossible to find a compromise as long as some of those involved continue to be on the scene. Even if DFO negotiations became completely transparent, it would be surprising if the fishing groups' resentment were to disappear. In this regard, the comments by the representative of the Fisheries Council of B.C. are eloquent:

> [...] with the current interlocutors for the Government of Canada there is no meaningful dialogue possible . . . I am asking for the Government of Canada to represent my rights as a citizen of this country and to deal fairly and straightforwardly with this issue and be receptive to ideas that are constructive--and we do have some. But I am not going to share them with people who are prepared to wipe them away under the table.(16)

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(16) *Ibid.*, 16:83.

In the same breath, the commercial fishing groups state almost unanimously that they are open to a transparent negotiation process, in which all parties would be not only represented but interactive as well. Oddly enough, while nearly all the parties say they are prepared to discuss in order to find solutions, few of them seem genuinely prepared to listen. Both aboriginal and non-aboriginal groups claim to be victims; this situation is not conducive to discussion, especially since it is felt from the outset that DFO can do no right. When the debate was at its height, the representative of the B.C. Fisheries Commission, in an inspired observation, said that the only real victim was the resource itself. Until all the parties adopt and clearly demonstrate the same approach, the chances of reaching an agreement remain slim.

In the opinion of several observers, the fact that DFO succeeded in reaching only piecemeal agreements and not an agreement for the entire Fraser system stems not only from lack of time, but also from lack of communication, on two fronts: first, between DFO and the various aboriginal communities along the river and, second, among these communities themselves. It seems clear that as long as there is no agreement for the entire Fraser system, salmon management will remain a very difficult, if not impossible, task.

2. Surveillance and Enforcement

While the obvious lack of communication resulted in frustration and incomprehension among fishing groups, it must also be said that senior DFO officials have their own communication gap.

Surveillance and enforcement constitute one of the most contentious and clouded fisheries issues. Several witnesses declared that DFO had not fulfilled its responsibility to protect the resource during the 1992 season by ordering that, under the AFS, charges were not to be laid against offenders. The Pearse-Larkin report also notes this situation: "Fishery officers had been instructed not to lay charges while delicate negotiations about fishing Agreements were ongoing."[17] Called upon to comment on this statement, DFO Pacific Regional Office Director General Pat Chamut and Deputy Minister of Fisheries Bruce Rawson gave divergent responses.

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(17) Pearse-Larkin Report (1992), p. 18.

Asked about monitoring violations, Mr Rawson stated, "On the question about requiring fisheries officers not to proceed with charges, I did not issue those instructions to anyone."[18] In support of his statements, the Deputy Minister noted that approximately 80 charges had been laid against aboriginal people in 1992. An DFO news release issued in early February 1993 confirmed that there had been 85 charges laid against aboriginal people, although it was not specified whether or not they were participating in the commercial fishery.

Questioned in turn on this point, DFO Pacific Regional Office Director General Pat Chamut attempted to place the comment in the Pearse-Larkin report in context by stating, "[. . .] pending the completion of consultation, it was not legally feasible for the department to exercise full enforcement until we had designed a fishing plan that was intended to be in place when the main fishery was concluded."[19] The Deputy Minister shot back, "I have to say that no such directive was issued, straight like that." This exchange between senior officials reveals a communication gap among officials themselves, which resulted in a clouded--rather than contentious--situation that should not have come about, given the state of affairs. According to the Pearse-Larkin report, several observers had the impression that the 1992 fishing season was out of control; so, it appears, were the actions of officials.

The number of charges laid and the identity of the accused remain unclear, which demonstrates that DFO's actions were not particularly transparent; a fact confirmed by the news release mentioned earlier. The Department's enforcement officials confirmed that the 85 charges against aboriginal people had been laid under the AFS; this would mean that no charges had been laid against members of commercial aboriginal fishing groups. That situation is hardly likely, but it has been impossible to obtain official comments on this matter from DFO.

This obvious lack of past and present transparency will likely be detrimental to the smooth operation of the AFS; as well, the confusion created by senior officials' statements--and particularly the fact that they made no attempt to correct the situation afterward--has only exacerbated feelings of insecurity among the parties concerned. This absence of transparency has also led some individuals to overstep the rules, which has added a little more pressure and confusion to a situation that was chaotic from the outset.

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(18) Canada, House of Commons, Standing Committee of the House of Commons on Forestry and Fisheries, *Minutes of Proceedings and Evidence*, 25 January 1993, 16:24.

(19) *Ibid.*, 16:26.

3. Pilot Projects for the Commercial Sale of Fish Caught for Traditional Purposes

In 1992, one component of the AFS, pilot projects for the commercial sale of salmon caught under community licences, caused a great deal of interest because it created a precedent. Three commercial sale pilot projects were the subject of nine agreements. These pilot projects were designed so that they would neither disturb the traditional sharing among groups nor be detrimental to the processing industry. Transactions made under these pilot projects were to be subject to the legislation and regulations governing commercial sales.

With hindsight, we can now state that some people saw the pilot projects as being applicable in every location without surveillance; as a result, in certain locations the 1992 fishing season was an open fishery subject to no rules whatsoever. The issuance of individual licences for community fishing did a great deal to make the situation even more chaotic. DFO did demonstrate a lack of discretion: by proceeding in this way, it suggested that everyone had this privilege. The result was that surveillance became impossible both in law and in fact. As we shall see in greater detail, DFO planned to issue no further such individual licences in 1993, and to regulate community licences much more strictly.

One major part of the AFS issue could be summarized as follows: do aboriginal peoples have the right to sell fish caught under non-commercial licences? Obviously, this question has a two-part answer: in the opinion of aboriginal peoples, who have always seen fish as an exchange currency, sale is a means of economic development leading to self-sufficiency and autonomy; in the opinion of the other--sport and commercial--fishing groups, authorizing the sale of fish caught for traditional purposes favours one group and thus distorts the market by creating unfair competition.

As the following comment by a representative of the Commercial Fishing Industry Council clearly demonstrates, support for even the Supreme Court decision is far from unanimous: " I suppose anybody can take the *Sparrow* decision and make what they will of it, but as far as fishermen here see it, the *Sparrow* decision implies no obligation on the part of the government to commercialize the sales of fish."[20]

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(20) *Ibid.*, 16:39.

a. Participation by Aboriginal Peoples in the Commercial Fishery

This strong resentment of the sale of fish by aboriginal people was probably the determining factor that incited non-aboriginal commercial fishing groups to launch a vigorous movement against the AFS; this opposition continued during the 1993 season.

According to their own statements, non-aboriginal fishing groups are in favour of participation by aboriginal people in the commercial fishery, on condition that they respect the established rules governing that fishery. In other words, they are in favour of allowing aboriginal people to participate more actively in the commercial fishery, but under an industrial strategy that would respect the present rules governing the commercial fishery. Greater participation by the aboriginal people would be facilitated by the federal government's buying back existing licences.

However, this strategy would be expensive. A study prepared by the commercial fishing groups indicates that reallocating 5% of present quotas to aboriginal people would result in a $547-million shortfall over a 20-year period for licence holders, crews and plant workers. Still assuming the reallocation of 5% of present quotas, it is estimated that compensation to licence holders alone would cost $43 million.[21] The 1992 AFS budget for buying back licences amounted to $7 million, a very small amount for such a large undertaking. Even if the methodology used to arrive at the estimate can be challenged, it is still clear that transferring part of the total quota to aboriginal people will certainly result in expenditures exceeding $7 million.

b. The Difficulty of Recognizing a Constitutional Right

That being said, non-aboriginal groups lose sight of the fact that the Constitution has recognized that aboriginal people have a right and that, from now on, that right must be respected--even though lengthy judicial thought will undoubtedly be required to reach a strong, unanimous interpretation of *Sparrow* on the commercial sale of fish by aboriginal people.

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(21) Edwin Blewett, *Compensation Valuation Study: A Study Completed for the Commercial Fishing Industry of Issues Related to Compensation to the Commercial Fishing Industry for Reallocations to the Aboriginal Fishery*, Vancouver, November 1992.

Indeed, that lengthy process is now being conducted through decisions being made by the lower courts (see the section on *Sparrow* above).

The issue consists, not in this process, but in the fact that it is difficult to give recognition to a constitutional right that people already have; we are brought back to the constant tension between collective rights and individual rights. While it is true that the commercial sale of salmon is already an important activity for non-aboriginal commercial fishing groups, it is no less true that authorizing aboriginal people to sell their catches commercially seems to be a good means of community economic development--although this economic approach must respect the principle of sustainable development. Obviously, in light of the events of the 1992 season, this did not happen.

The pilot projects for commercial sale did not have the desired effects, and demonstrated that it is difficult to control the spinoff effects of such projects. The single, simple argument that this approach is not viable seems enough for DFO to thoroughly rethink this component of the AFS. Regardless of who was responsible for the alleged disappearance of 500,000 salmon in 1992, one main cause of the problem is still a government policy that was unable to meet viability criteria. DFO's primary responsibility is to protect the fisheries resource; it did not demonstrate that it had assumed this responsibility, and no one else feels that increased surveillance will improve the situation; quite the contrary.

As the Pearse-Larkin report suggests, the justification for the commercial sale of fish by aboriginal people must be recognized; but, at the same time, the operation of these sales must be rethought. For this to happen, there must be better consultation and greater participation in the process by all parties concerned. If even one party feel that its rights have been infringed upon, then there will still be abuses.

Because the fisheries are a public resource, extreme measures are sometimes required. While it is true that all parties concerned are prepared to negotiate in exchange for genuine participation in the process--even if some scepticism about their being prepared to listen to each other is appropriate--DFO should seriously consider letting the main parties concerned negotiate among themselves a framework agreement for a comprehensive Fraser fishery strategy. The negotiating group could receive technical and administrative assistance from DFO but, ideally, the solutions should actually come from the parties concerned, not from the Department.

This strategy would have the advantage of promoting the development of local solutions to local problems and encouraging exchanges of views among the groups that use and want to protect the same resource.

If the parties concerned failed to reach a concrete, universally acceptable solution, DFO would be justified in significantly limiting the fishing rights of all parties, citing the need for conservation and the danger of a possible recurrence of the events of 1992. The situation is so grave that half-measures are unacceptable. Only when all parties have demonstrated their goodwill will we be able to expect some degree of balance again.

As we shall see, DFO did not adopt this approach for 1993, though it may be obliged to do so eventually.

4. The Right to Manage and the 1992 Fishing Effort

In addition to communication gaps and the debate over aboriginal people's right to sell salmon commercially, another fundamental part of the AFS issue is the greater latitude it gives to aboriginal people to manage the fisheries.

This situation, however, is not limited to the fisheries. Rights to manage resources are major components of aboriginal land claims. When we remember that the *Constitution Act, 1982* must also be taken into consideration, we realize the complexity of the situation. This complexity is increased by the fact that the resource concerned, salmon, unlike other resources, is migratory, depends on factors that are often impossible to evaluate, has many subspecies, and has commercial, social and ceremonial value.

In 1992, some 57 bands in B.C. signed 80 agreements providing for their participation in salmon management and development. In particular, these agreements provided that the aboriginal communities could issue fishing licences and monitor catches.

Non-aboriginal fishing groups perceived this devolution of a right to manage as nothing less than abandonment by DFO of its responsibility to manage and protect the resource. Paradoxically, although the aboriginal people locally claim the right to manage and sell salmon commercially, they are not inclined to assume full responsibility for the resource; on the contrary, they request DFO participation. The statement by a tribal council on this matter is eloquent: "The Department of Fisheries and Oceans has a responsibility to support the

development of local salmon management, and in particular to provide scientific and technical information and knowledge required for the development by local boards of production, harvest and management plans."[22]

It must be acknowledged that in modern fisheries, fishing groups, regardless of race, cannot be seen as prominent environmentalists or protectors of the resource, particularly when the resource is a public one of great value, and limited time is allowed to harvest it. Seen in this light, fishing groups are all predators rather than proponents of sustainable development, whatever they may say.

While DFO worked very hard to increase participation by aboriginal people in management of the resource, it apparently failed to ensure that non-aboriginal fishing groups participated in that management. In the opinion of the latter groups, balanced management of their resource was disrupted with the arrival of a new management participant; the situation appeared all the more threatening since these groups' own attempts to make their interests heard had been to no avail. As we have noted, the only solution in the opinion of non-aboriginal fishing groups is a commercial approach, which would allow aboriginal peoples to participate in the commercial fishery and compete within its present framework.

It is true that DFO's approach of allowing piecemeal management of a resource whose cyclic and migratory characteristics are as complex as those of salmon passes understanding. How can it be conceivably possible to manage locally a resource that migrates to that territory only once a year? Furthermore, in many locations, responsibility for management appears to lie with the villages, a situation that, while certainly democratic, may not be flexible or prompt enough to ensure sound salmon management. How can some communities claim, as they do, that their territories account for 20%, 30% or even 50% of Fraser salmon production, when we know that salmon is an anadromous species and therefore needs salt water as much as fresh? What would the powers of these local managers amount to if the Americans opted for a massive interception of salmon originating in the Fraser--as in fact they do with impunity elsewhere.

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(22) Nuu-chah-nulth Tribal Council, *Presentation to the Standing Committee on Forestry and Fisheries*, Vancouver, 26 January 1993, 4.

Management of a public resource goes beyond geographic and social boundaries. Managers who are not fully responsible for their actions cannot be made accountable for them, and will therefore never allocate the resource fairly. At present, while DFO may not have been a very skilful manager of this resource, it is the only manager, and all parties know whom to blame. This is, in part, the way things should be, and this is the way we probably should try to go, while ensuring that objectives and decisions are more transparent.

THE 1993 SEASON: PHASE II OF THE AFS

Following the events of the 1992 fishing season, nearly all parties hoped that stricter management would correct the situation. As Pearse and Larkin emphasized in their report:

> We cannot allow the turmoil of 1992 to be repeated. If it happens again, confidence in the management system will be hard to repair, and progress in Indian fishery policy will suffer a serious setback. Most important, valuable salmon resources could be irreparably harmed.(23)

Pearse and Larkin set out four essential conditions for improvement of the situation. These conditions could also easily be considered recommendations to DFO; they are as follows: all participants must be committed to conservation; aboriginal groups must work together; fishermen and mangers must be accountable; and there must be strict enforcement.

Pearse and Larkin also recognize that these four conditions can be met only if communication, dissemination of information and consultative structures are also improved. And, since DFO is the main fisheries management agency, the burden of improving these components of management of the resource lies with DFO. In early 1993, the Department therefore suggested the following Action Plan:

- extensive consultation with all band chiefs in the Fraser system and all parties concerned;

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(23) Pearse-Larkin Report (1992), 29.

- negotiation and finalization of 1993 agreements before the spring;
- training additional fisheries guardians;
- additional hydro-acoustic monitoring gear;
- completion of the initial licence retirement program;
- increased regulation of the purchase of fish and recording of sales;
- increased surveillance and enforcement; and
- continued testing of controlled sale of fish from the aboriginal fishery.

DFO followed this Action Plan fairly closely. A blitz of discussions and negotiations in early 1993 made it possible to reach some 26 agreements with aboriginal groups and, although the agreements did not cover the all B.C. waterways, as the Pearse-Larkin report had recommended, work toward this end continues.

In addition, new training programs made it possible for 60 aboriginal fisheries guardians to join ranks with the 81 such guardians trained in 1992. The voluntary commercial fishing licence retirement program was also successful: 240 licence retirements were requested during the first round and 167 during the second round, while 75 licences were retired at a cost of $5.95 million. Lastly, additional, more sophisticated hydro-acoustic monitoring stations than those at Mission were installed on the Fraser.

Even so, if we rely on accusations made by many parties, the communication gaps do not seem to have narrowed. As we have noted, the apparent lack of communication is a lack of listening more than anything else, by DFO as well as by non-aboriginal commercial fishing groups; this is a problem that only intensifies with time, and one that DFO has not yet been able to solve.

Aside from the DFO 1993 Action Plan, however, the highlight of this fishing season was the announcement of the new *Aboriginal Communal Fishing Licences Regulations*, adopted on 18 June 1993. Made under the *Fisheries Act*, these new Regulations give concrete expression to the 1992 measures taken to increase aboriginal people's participation in managing their fisheries and to clarify the application of the Regulations. Under these new Regulations,

unlike the previous year, licences issued to aboriginal people will be community licences, not individual licences, and will include conditions providing control of the fishing effort and a surveillance and enforcement system.

The 1993 Regulations renew the three pilot projects for the commercial sale of fish caught by aboriginal peoples under community licences. In addition to the pilot project on the Fraser supervised by the LFFA, another pilot project will be carried out on the Skeena River, where the sale of 150,000 sockeye salmon allocated under the heterogeneous salmon bank management plan will be authorized; lastly, a third pilot project will be carried out on the Somass River at Port Alberni. It is anticipated that this third pilot project will generate revenue of over $1.5 million.

Certainly we can recognize the goodwill of DFO, which seeks to meet the indirect requirements of *Sparrow*; but, in light of the mixed results of the 1992 experiment, we wonder whether these circumstances will only increase the frustration and anger of non-aboriginal commercial fishermen. DFO does not seem to shrink from confrontation, however; this year again, and despite estimates that suggest strong salmon runs, it closed or limited some previously authorized fisheries.

Early in the 1993 season, DFO predicted record catch levels, possibly totalling 42.6 million salmon: 12 million sockeye, 25 million pink, 2 million keta, 3 million coho, and 600,000 chinook. Initial estimates for the Fraser call for sockeye runs of up to 17.4 million, which would mean allocations of 9 million for the commercial Canadian fishery, 2.4 million for the American fishery, and 975,000 for the aboriginal fishery, including 625,000 to the LFFA for subsistence purposes and commercial sales. Retiring and buying back 75 licences has made it possible to allocate 190,000 additional salmon to the aboriginal fisheries.

CONCLUSION

The 1993 west coast fishing season will be decisive for DFO fisheries management policy. After learning about the errors it committed in 1992, DFO expended a great deal of energy in finding grounds for agreement on salmon management. With the exception of the obvious communication gap, DFO has worked very hard to reach a collective,

coordinated framework agreement for the Fraser, the absence of which was a serious shortcoming in 1992. At the same time, DFO has sought to improve surveillance and enforcement, and has refined the agreements on the pilot projects for the commercial sale of fish by aboriginal people. Furthermore, in June 1993, Canada reached an agreement with the United States on west coast salmon catches; this issue in salmon management is often ignored in the current debate, but is crucial to the viable use of this resource.

Despite all these initiatives, DFO has been unable to rally all parties concerned to support its management policy; non-aboriginal commercial fishing groups continue to feel excluded. As we have already noted, only comprehensive cooperation, carried out to the satisfaction of all parties concerned, would ensure sound salmon management. No other approach will synchronize the federal bureaucracy's clock with the biological clock of the fish.

Management of west coast salmon, from *Sparrow* to the AFS, is certainly necessary for sustainable development of this resource, but it is also being used as a testing ground for another form of sustainable development, that of aboriginal communities. At present, there is no guarantee that either will last.

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